PUBLIC PROSECUTOR

v.

MAT ZALI DERAMAN

HIGH COURT MALAYA, KOTA BHARU
SULEIMAN HASHIM JC
[ARREST CASE NO. SKB (A) 73- 12- 86]
21 OCTOBER 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Possession - Presumption of possession - Drugs found inside a bag on seat of bus where accused was seated - Random spot check by Anti Smuggling Unit along highway - Pre-requisites "custody" or "control" - Circumstancial evidence.*

EVIDENCE: *Failure to cross-examine a witness on a crucial part of case - Whether amounts to acceptance of witness's testimony.*

The accused was charged with trafficking cannabis weighing 1,153.9 grammes under the DDA 1952. In a random spot check along a highway, a bus was stopped and the cannabis was discovered in a bag on a seat of the bus. Evidence was led by the prosecution that the accused had left the seat where the bag was found upon seeing an Anti Smuggling Unit officer approaching him. A witness for the prosecution, SP7, who had sat a few seats beside the accused had seen the accused holding the bag before the bus was stopped.

Held:

[1] There was *prima facie* evidence "not inherently incredible" against the accused as in the charge. Hence the accused was ordered to make his defence in answer to the charge.

[2] Upon consideration of the totality of the evidence there is doubt as to whether the accused "had in his custody or under his control" under s. 37(d) of the Act, of P12, that is the bag in which were the cannabis.

[3] The accused was given the benefit of doubt as the presumptions of "possession" and knowledge thereto and the presumption of trafficking under s. 37(da)(vi) does not arise. The accused was found not guilty as charged and was acquitted and discharged.

[Accused was acquitted and discharged.]

Cases referred to:

Ho Ming Siang v. PP [1966] 1 MLJ 252 ***(cit)***
PP v. Lee Tin Bau [1985] 1 MLJ 388 ***(cit)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(cit)***
A. Ragunathan v. PP [1982] CLJ (Rep) 63 ***(cit)***
Munusamy v. PP [1987] CLJ (Rep) 221 ***(cit)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(cit)***
PP v. Salleh b. Said [1983] 2 MLJ 164 ***(cit)***
Pie bin Chin v. PP [1985] 1 MLJ 234 ***(cit)***
Yow Choon v. PP [1972] 1 MLJ 205 ***(cit)***
Jayaram v. PP [1982] 2 MLJ 306 ***(cit)***
PP v. Tan Huang Hiang [1990] 2 MLJ 24 ***(cit)***
Khoon Chye Hin v. PP [1961] 27 MLJ 105 ***(cit)***
K.J. Barlow/B.G. Chambers v. PP [1986] 2 MLJ 104 ***(cit)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), 39B(1)(a), (2)

For the DPP - Amiruddin b. Abd. Rahman
For the accused - Chew Kok Lian; M/s. Syarikat Teo & Chew

JUDGMENT

Suleiman Hashim JC:

The accused was charged:

> Bahawa kamu pada 8 Julai 1986, jam lebih kurang 1 p.m di dalam bas Syarikat Kenderaan Melayu Kelantan No. DJ 4013, di Jalan Raya Pasir Pekan, Wakaf Bharu, di dalam daerah Tumpat, di dalam Negeri Kelantan telah didapati di dalam milik kamu "Cannabis" seberat 1,153.9 gram untuk tujuan diperedarkan. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The trial ended on 28 September 1991. I reserved judgment to consider with respect I think one inadequacy in the case for the prosecution and inadequacies in the case for the defence.

The case for the prosecution is as stated by Idris b. Mohd Saad (SP5). This was a spot check, a random spot check mounted along the highway by a team of the Anti Smuggling Unit (Unit Mencegah Penyeludupan, UPP) comprising officers from the Police, Lembaga Padi Negara and Customs, headed by Police Corporal 40478 Zainudin b. Ahmad (SP9), and SP5 said:

> Pada 8 Julai 1986 saya bertugas di LPN Pengkalan Kubur, Merinyu LPN (Lembaga Padi Negara).
>
> Pada 8 Julai 1986 saya bertugas membuat sekatan atau pun spot check di Jalan Raya Pasir Pekan, Wakaf Bharu, Tumpat, saya bersama Kpl. 40478 Zainudin, LPN 385 Mohd Noh, PK 3030 Wan Ramli, Wan Ramli bin Wan Kadir PK 2287, PK Zikri dan Drebar masa itu Konst. Mohamed 591641 (semua dicam), lebih kurang pukul 1 tengah malam saya dan lain-lain anggota telah menahan sebuah bas yang datang dari arah Pasir Mas menuju ke arah Kota Bharu, setelah bas itu berhenti saya bersama dengan LPN 385 Mohd Noh menaiki bas itu untuk membuat pemeriksaan Mohd Noh mula naik diikuti oleh saya. Mohd Noh membuat pemeriksaan di bahagian hadapan bas, saya naik menghala untuk hendak membuat pemeriksaan di bahagian belakang sambil saya melihat terus ke pintu kecemasan bahagian belakang, saya nampak seorang lelaki dalam keadaan separuh bangun dalam mengerakan baru berpusing ke pintu kecemasan tetapi tidak jadi. Saya terus kejar di belakang, lelaki tersebut bangun terus dari pada tempat duduknya di kerusi yang belakang sekali sebelah kanan bas berhampiran pintu kecemasan, dia bangun menghala ke hadapan dan berselisih bahu dengan saya semasa berjalan saya ke tempat duduk beliau. Saya dapati keadaan beliau dalam keadaan ketakutan dan mencurigakan. Saya terus ke tempat duduk beliau dan saya menjumpai sebuah beg warna kekuningan terletak di bahagian hujung tempat duduk di belakang sekali di sebelah kanan bas berhampiran pintu kecemasan. Saya terus mencapai beg itu, sebelah tangan saya pegang beg itu saya perhatikan lelaki tersebut cuba hendak duduk dan duduk di sebelah seorang perempuan di tempat duduk yang berhampiran dengan tangga bas. Saya buka beg tersebut didapati dalam beg tersebut ada satu lipatan kain pelikat berpetak kecil berwarna merah, kemudian saya dapati di bawah kain pelikat itu satu bungkusan plastik berwarna putih yang terbuka di dalamnya berisi dengan bungkusan surat khabar Siam. Saya koyak sedikit bungkusan itu saya dapati daun-daun kering yang disyaki ganja. Seterusnya saya bertanya kepada dua orang lelaki yang duduk di tempat duduk yang sama di bahagian belakang bas yang duduk di sebelah kiri bas, lelaki tersebut, dua orang lelaki tersebut memberitahu saya beg itu kepunyaan lelaki yang berselisih bahu dengan saya yang duduk di sebelah perempuan bertentangan dengan tangga bas. Saya terus mencapai beg itu dan membawa beg itu terus kepada lelaki tersebut dan mengajak lelaki tersebut supaya ikut saya turun bas, tetapi beliau enggan seterusnya saya memegang lengan sebelah kiri beliau dan tarik beliau dari tempat duduk itu dan terus membawa beliau turun dari bas. Beliau turun

dulu diikuti saya di bahagian belakang. Setelah lelaki tersebut sampai ke bawah saya ketika itu berada di bahagian tangga yang bawah sekali, maaf semasa saya bawa beg daripada belakang semasa hendak dekat lelaki tersebut di sebelah perempuan saya menjerit ke bawah memberitahu anggota yang di bawah dengan perkataan "saya mendapat barang".

The bag is P12 in which were the cannabis, the subject matter of the charge. SP5 found P12 on a seat in the last row of seats in the bus between where SP5 saw the accused was seated, before the accused left the seat to go to sit next to a lady and the emergency exit on the off-side of the bus. P12 was next to the accused and near the emergency exit but whether immediately next to the accused or how far or how near the accused was not in evidence.

The "seorang perempuan" referred to by SP5 is the lady Puan Nooraini bt. Haji Abdullah (SP6) a passenger in the bus, "dua orang lelaki" referred to by SP5 are Elias B. Abdullah (SP7), Amran b. Mat Salleh, another passenger who was travelling with (SP7) and Amran b. Mat Salleh; another passenger who was travelling with SP7, Amran is now untraced. The police have made all reasonable efforts to trace Amran to no avail, Amran having gone to Singapore to work as a construction worker, address, whereabouts in Singapore not known, when he would return to Malaysia not known and I do not think there can be any adverse inference drawn against the prosecution for not calling Amran as a witness. SP5 identified the accused, P12 and its contents including the cannabis, the subject matter of the charge. SP5 also identified SP6 and SP7.

The evidence of SP6 supported the evidence of SP5 in that where SP5 said the accused was "dalam keadaan ketakutan" SP6 said the accused came and sat next to her "tergesa-gesa duduk di sebelah kiri saya". SP6 identified the accused and SP5 but could not identify P12.

The evidence of SP7 also supported the evidence of SP5, SP7 said:

Bas ditahan oleh UPP selepas selekoh Pasir Pekan:

Selepas bas itu ditahan salah seorang anggota UPP naik bas, kemudian diikut lagi oleh salah seorang UPP dari belakang.

Salah seorang mereka pergi belakang dan memeriksa beg yang berada di belakang. Kemudian anggota UPP bertanya kepada saya beg siapa yang di belakang itu. Saya memberi tahu beg itu kepunyaan seorang lelaki yang telah berpindah tempatnya di depan dan duduk di sebelah perempuan. Saya tidak mengenali perempuan itu. Kemudian UPP itu membawa turun beg dan naik semula bas menangkap lelaki yang saya beritahu itu.

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Ada orang duduk di sebelah kanan saya, dia duduk di tepi dinding, di sama bangku yang saya dan Amran duduk, iaitu di bangku belakang sekali.

Orang ini duduk di bangku yang sama saya dan Amran duduk sebelum bas sampai Pasir Pekan.

Bila orang ini datang duduk saya tidak perasan tetapi orang ini ada sebelum bas sampai Pasir Pekan, sebelum bas ditahan oleh UPP.

Semasa saya dan Amran berlepas dalam bas daripada Rantau Panjang orang ini tidak ada duduk di bangku saya dan Amran duduk.

Bila dia datang duduk saya tidak perasan.

Tidak ada sesiapa lain duduk di sebelah lelaki itu.

Di antara tempat saya duduk dan tempat orang itu duduk kosong, tiada sesiapa.

S. Bersama lelaki itu ada dia bawa apa-apa.

J. Saya lihat ada sebuah beg sebelah kanannya.

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Lelaki itu yang duduk sama bangku dengan bangku saya dan Amran duduk berpindah pergi duduk sebelah seorang perempuan sewaktu anggota UPP menaiki bas. Semasa dia berpindah dia tidak membawa apa-apa bersamanya.

Mahkamah

S. Bagaimana Elias boleh memberitahu seorang anggota UPP beg itu kepunyaan lelaki tu.

J. Sebelum itu saya ada melihat dia memegang beg itu.

PS.

S. Bila awak nampak dia pegang beg itu.

J. Sebelum bas ditahan.

Selepas lelaki itu berpindah ke depan duduk sebelah perempuan anggota UPP pergi lihat beg itu di belakang, di tempat duduk di sebelah kanan saya dan dia membawa beg itu kemudian dia bertanya kepada saya siapakah yang berada di situ sebelum anggota UPP itu naik, saya hanya memberitahu salah seorang lelaki yang berada di situ telah berpindah ke depan dan duduk di sebelah seorang wanita.

Kemudian dia bawa beg itu ke bawah dan naik semula ke atas bas dan menangkap lelaki yang berkenaan.

SP7 identified SP5 but could not identify the accused SP6 or P12.

SP7 did say, however, that only one person did get up to change seats, to go sit next to a lady. SP7 was seated on a seat in the same last row of seats a few seats away from the accused before the accused changed seats, to go sit next to SP6.

Mohd Yusof bin Daud (SP8) was the driver of the bus. He said that after the bus had stopped for the UPP check, members of the UPP, he could not remember how many, boarded the bus, conducted a search and he heard "bunyi bising di bahagian belakang saya tengok ada seorang UPP penumpang bas dia bawa turun daripada bas, yang sempat saya tengok". He confirmed the bus ticket (P24) found in possesion of the accused was for travel from Pasir Mas to Kota Bharu that day. SP8 could not identify anyone or anything except P24. Hassan b. Mohd, the bus conductor could not be traced, he had left the employment of the bus company some three years ago, present address, whereabouts not known and here too the police have made all reasonable efforts to trace him to no avail and I do not think there can be any adverse inference drawn against the prosecution for not calling him as as a witness.

SP5, SP6, SP7, SP8 were strangers to each other and I do not think they could have or would have jointly or severally fabricated evidence against the accused, *Ho Ming Siang v. PP* [1966] 1 MLJ 252.

With respect I, now come to the one inadequacy in the case for prosecution. The case for the prosecution is made up of one strand, and only direct evidence, that is, the evidence of SP7 and other circumstantial evidence, that is, the evidence of SP5, SP6 and SP8. It is in the only one strand of direct evidence, that is, the evidence of SP7 that there is this one inadequacy. As regards the accused *vis-a-vis* P12 all that SP7 said was:

S. Bersama lelaki itu ada dia bawa apa-apa.

J. Saya lihat ada sebuah beg sebelah kanannya.

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S. Bagaimana Elias boleh memberitahu seorang anggota UPP beg itu kepunyaan lelaki itu.

J. Sebelum itu saya ada lihat dia memegang beg itu.

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S. Bila awak nampak dia pegang beg itu.

J. Sebelum bas ditahan.

With respect herein is the one inadequacy in the case for the prosecution. SP7 did not say when did he first see the accused, when did he first see P12, when did he first see the accused with P12, what did he mean by "beg sebelah kanannya", what did he mean by "dia memegang beg", what did he actually see, what did the accused actually do with P12, how did the accused hold P12, in what manner did the accused hold P12, for how long did the accused hold P12, what did the accused do with P12 after holding P12, where did the accused put P12 after holding P12. These would have helped to prove the pre-requisite "custody" or "control" under s. 37(d) of the Act of P12 by the accused beyond reasonable doubt. These perhaps may not be necessary if anything belonging to the accused was also found in P12 as where the accused's clinic card and passport were found in the briefcase together with two revolvers, pair handcuffs, rounds of ammunition in *PP v. Lee Tin Bau* [1985] 1 MLJ 388. And I think the case for the prosecution is dependent on s. 37(d), (da)(vi) of the Act which means that the prosecution must prove the pre- requisites "custody" or "control" under s. 37(d) of the Act of P12 by the accused beyond reasonable doubt before there can arise the presumption of "possession", knowledge under s. 37(d) and thence the presumption of trafficking under s. 37(da)(vi) of the Act.

With respect, nonetheless, I think *prima facie* there is evidence "not inherently incredible" against the accused is in the charge, *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, *A. Ragunathan v. PP* [1982] CLJ (Rep) 63, *Munusamy v PP* [1987] CLJ (Rep) 221 and subsequent cases and I called upon the accused to make his defence in answer to the charge and the accused gave evidence on oath.

Learned defence Counsel had cross-examined SP5:

S. Encik Idris telah membuat pemeriksaan jumpa beg tersebut di bahagian belakang bas dan beg tersebut telah diturunkan daripada bas beg tersebut telah dibawa turun oleh Encik Idris daripada bas tersebut selepas itu Encik Idris naik balik semula ke bas-bas tersebut dan membuat pemeriksaan kepada tertuduh, Encik Idris dapati beliau tiada surat perjalanan yang sah kerana beliau adalah warganegara Thai, dan Encik Idris tangkap beliau.

J Tidak benar.

Learned defence Counsel had cross-examined Insp. Ghazali b. Harun (SP10), the Investigation Officer:

S. Tertuduh ada tidak beliau mempunyai surat perjalanan yang sah.

J. Beliau ada hanya Kad Pengenalan Siam (P23)

It would have appeared that learned defence Counsel was laying the foundation simple and straightforward to explain why the accused changed his seat from the rear to next SP6 "dalam keadaan katakutan", "tergesa-gesa" especially when SP5 had said the seat next to SP6 was "berhampiran dengan tangga bas", "bertentangan dengan tangga bas", thus the accused was in a vantage position to make a bid for escape at an opportune moment, at that moment SP9 who is quite burly in size and other officers were milling outside around the bus.

The accused gave evidence on oath and "struck a discordant note" to what would appear to be an otherwise placid defence laid on by defence Counsel. Thence followed the inadequacies in the case for the defence.

The accused denied all connection, any connection with P12, but not all knowledge of P12 and the accused went on to narrate at least five episodes, each an inadequacy in that witness for the prosecution were not cross-examined on any of the five episodes. The accused said:

(1) the bus had first stopped before reaching the roundabout, before it was stopped by the UPP after the roundabout and at this first stop two boys had alighted the bus *via* the rear exit, while an elderly person had alighted the bus *via* the front exit.

One of the two boys had left P12 next to him. SP8 was not cross-examined on this. SP8 had inequivocally, categorically said , "Bas kita bas cepat, berlepas Rantau Panjang ke Pasir Mas, selepas itu tidak berhenti-henti sehingga road-blok UPP itu, selepas itu bas terus ke Kota Bharu. Di Pasir Mas ada penumpang naik turun bas".

(2) he changed his seat not after the bus were stopped by the UPP not after SP5 had boarded the bus but before all that , "saya rasa pening mahu muntah, semasa saya pindah bas masih sedang berjalan". SP5, SP6, SP7 were not cross-examined on this.

(3) three UPP officers boarded the bus, all in uniform, one with long hair and with beard. Perhaps a minor point but no prosecution witnesses were cross-examined on this.

(4) SP5 alighted the bus taking away P12 after which SP5 returned and asked him for his identification. SP5 was not cross-examined on this.

(5) he and SP5 did not cross one another (ber selisih bahu). SP5 was not cross- examined on this.

As regards failure to cross-examine the leading authority that is *Wong Swee Chin v. PP* [1981] 1 MLJ 212, Raja Azlan Shah CJ (Malaya) as he then was said:

> On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* ...

In *PP v. Salleh b. Said* [1983] 2 MLJ 164 it was held the failure to cross-examine was an "afterthought" by the accused. In *Pie bin Chin v. PP* [1985] 1 MLJ 234 such failure barred the accused from subsequently refuting the point by way of submission.

The defence tendered the accused's cautioned statement (D1) which thus became part of the case for the defence and I had to assess what weight to attach to the cautioned statement, to the incriminating portion if any, to the exculpatory portion if any, in the context of the whole cautioned statement, in the context of the evidence adduced by the prosecution, in the context of the evidence adduced by the defence and after having so assessed I may accept part of it and reject the rest, *Lim Yow Choon v. PP* [1972] 1 MLJ 205, and with respect I think I can use the same gauge although in the present case the cautioned statement formed part of the case for the defence, in *Lim Yow Choon's* case it formed part of the case for the prosecution.

Before I go on to assess what weight to attach to D1, perhaps I should explain why I refused on two occassions the learned Deputy's application to impeach the accused's credit based on D1. In the first application the learned Deputy underlined and submitted the following in D1 for impeachment:

> saya rasa tidak sedap hati kerana kedua lelaki itu turun dengan tidak membawa beg bersama mereka. Saya kemudian bangun dan pergi selang dua atau tiga kerusi di hadapan ...

In evidence the accused did say:

> saya tengok beg itu beg apa, rasa pelik dan setelah merasa tidak puas hati kemudian saya berpindah tempat

I think no contradiction, certainly no material contradiction here. In the second application the learned Deputy referred to "Alor Pasir" at line 37 p. 2 of D1 whereas the accused had said in evidence he boarded the bus at a place called "Munduk". With respect, if a contradiction, I do not think a material contradiction.

I now go on to assess what weight to attach to D1, the evidence by the prosecution, the evidence adduced by the defence, the totality of the evidence and I think I should not lose sight that in the present case what is crucial is P12, the **nexus** between the accused and P12 as would be "custody" or "control" under s. 37(d) of the Act of P12 by the accused beyond reasonable doubt or otherwise.

In D1 the accused admitted, "saya ada pegang beg itu tetapi saya tidak membuka". He was not asked why he did so. In his evidence:

S. Tetapi awak ada pegang beg itu.

J. Saya ada meletakkan tangan saya di atas beg itu.

S. Kenapa, apa tujuan, beg itu bukan kepunyaan awak.

J. Saya tengok beg itu beg apa, rasa pelik dan setelah merasa tidak puas hati kemudian saya berpindah tempat.

The accused's contention that P12 was left behind next to him in the bus by two boys is to be found in both D1 and in his evidence. But witnesses for the prosecution were not cross-examined on this, a crucial matter hence a crucial inadequacy in the case for the defence. As against that inadequacy on the other hand there is the evidence of SP7 to provide the **nexus** between the accused and P12. But this evidence of SP7 which is the only one strand of direct evidence to provide the **nexus** between the accused and P12, is with its inadequacy as described earlier. Furthermore two other disquieting features in the evidence of SP7 have put me in a sense of inquietude:

(1) the evidence of SP5 is that, ... seterusnya saya bertanya kepada dua orang lelaki yang duduk di tempat duduk yang sama di bahagian belakang bas yang duduk di sebelah kiri bas lelaki tersebut, dua orang lelaki tersebut memberi tahu saya beg itu kepunyaan lelaki yang berselisih bahu dengan saya yang duduk di sebelah perempuan bertentangan dengan tangga bas.

The "dua orang lelaki tersebut" are SP7 and his companion Amran who now cannot be traced. What is odd is that both the "dua orang lelaki", i.e., SP7 and Amran (untraced) should have had to say to SP5, they must have said so simultaneously in unison or one after the other, odd when under normal circumstances one would have expected only one of them to say so.

(2) SP7 went on to say that photographs of P12 were taken in the bus itself, the only one witness for the prosecution to say so, not supported, in fact denied by other witnesses for the prosecution. SP7 said, "... lepas itu anggota UPP itu dan salah seorang jurugambar naik ke atas di belakang dalam bas kemudian dia letak semula beg itu di tempat asalnya kemudian jurugambar itu mengambil gambar beg itu beberapa kali. Kemudian beg itu dibawa semula ke bawah ..." and "... Dia membawa beg yang dia ambil tadi dan letakkan di tempat yang asal dan salah seorang jurugambar telah mengambil gambar beberapa kali".

Hence with the two disquieting features in the evidence of SP7 how much weight can I attach to the credibility of SP7 the only witness to provide the only one strand of direct evidence to provide the nexus between the accused and P12.

All other evidence against the accused, that is, the evidence of SP5, SP6, SP8 is circumstantial and here both the learned Deputy and learned defence Counsel submitted authorities on circumstantial evidence, *Jayaram v. PP* [1982] 2 MLJ 306 (DPP's) and *PP v. Tan Huang Hiang* [1990] 2 MLJ 24 (defence Counsel's). With respect the circumstantial evidence against the accused in the present case does not satisfy the test enunciated in the two cases as would be "custody" or "control" under s. 37(d) of the act of P12 by the accused beyond reasonable doubt.

In D1 the accused said that the reason he came to Malaysia was to meet a friend by the name of Yusof to discuss the purchase of *batu permata zamrud* from Yusof. In his evidence he denied having said so to the recording officer. I think here the accused was not telling the truth, I do not think the recording officer would have recorded so unless the officer was so told by the accused. In this evidence the accused said he came to Malaysia to inform his emak sepupu that his mother was gravely ill. Wan Nah bt. Ismail (D1) the emak sepupu gave evidence in support of the accused.

With respect the accused is not entirely a witness of truth but as stated in *Khoon Chye Hin v. PP* [1961] 21 MLJ 105 the whole of the evidence of a witness is not to be rejected because the witness had been "proved a liar on one or two points".

At the risk of being repetitive, crucial is P12 and the nexus if any between the accused and P12 as would be "custody" or "control" under s. 37(d) of the Act of P12 by the accused beyond reasonable doubt or otherwise. The accused denied any "custody" or "control" of P12 both in D1 and in his evidence, D1 being recorded at about 4.35 p.m. on 8 July 1986 some 3 3/4 hours after his arrest. The accused is not entirely a witness of truth. As against that the only prosecution witness to provide the only one strand of direct evidence to provide the nexus between the accused and P12 is SP7 whose evidence itself is not entirely impeccable, is tainted, is disquieting and with respect I think would put any reasonable person in a sense of inquietude. The conduct of the accused in the bus is not entirely consistent with guilt in respect of P12, the accused did not have valid travel documents, not like that of Barlow "shivering, disturbed and uneasy" in *K.J. Barlow/B.G. Chambers v. PP* [1986] 2 MLJ 104 SC. With respect after having seen, heard the accused and after assessment of D1, not forgetting that the accused is not entirely a witness of truth, with the disquieting features in the evidence of SP7, with the remainder evidence against the accused being circumstantial and *non est factum*, mindful that there are the inadequacies in the case for the defence especially the failure to cross-examine on a crucial part of the case, upon consideration of the totality of the evidence there is doubt as to whether the accused "had in his custody or under his control" under s. 37(d) of the Act of P12 beyond reasonable doubt and I give the benefit of the doubt to the accused which means that the presumptions of "possession" and knowledge thereto and the presumption of trafficking under s. 37(da)(vi) does not arise.

With respect I find the accused not guilty as charged and I acquit and discharge the accused. The accused is acquitted and discharged.

Also found at [1992] 2 CLJ 871